Supreme Court, U.S.
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No. 83-1717

In The
Supreme Court of the United States
October Term, 1983

ALABAMA SURFACE MINING RECLAMATION COMMISSION,

Petitioner,

v.

COMMERCIAL STANDARD INSURANCE COMPANY,

Respondent.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO ALABAMA SUPREME COURT

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TABLE OF CONTENTS

Pages

Table of Authorities i

Parent Companies and Affiliates iii

Statement of Facts 1

Argument:

A. No federal question was raised by Petitioner or decided against Petitioner in the state courts below. 6

B. This case is concerned solely with the interpretation of statutory law found in the Alabama Code and no valid question of federal law is involved. 8

Conclusion 13

TABLE OF AUTHORITIES

Cases

Alabama Surface Mining Reclamation Commission v. Jolly, 373 So.2d 855 (Ala. Civ. App. 1979) 11

Caldwell v. Texas (1891), 137 U.S. 692, 34 L.Ed. 816, 11 S.Ct. 224 12

Hoyt v. Shelden (1862), 66 U.S. 518, 17 L.Ed. 65 7

Lynde v. Lynde (1901), 181 U.S. 183, 45 L.Ed. 810, 21 S.Ct. 555 7

Maxwell v. Newbold (1856), 59 U.S. 511, 15 L.Ed. 506 7

Statutory Provisions

28 U.S.C. § 1257(3) 6

Code of Alabama, § 9-16-39 (1975) 3, 4, 5

Code of Alabama, § 9-16-51 (1975) 3, 6, 9, 10

Code of Alabama, § 9-16-70 (1975) et seq. 9

STATUTORY PROVISIONS—Continued

	Pages
Sup. Ct. R. 17	7
Sup. Ct. R. 21(1) (h)	7

PARENT COMPANIES AND AFFILIATES

As of the date of this filing, Commercial Standard Insurance Company is a wholly-owned subsidiary of F.W.T. Corporation. F.W.T. Corporation is a wholly-owned subsidiary of Western Preferred Corporation. Early American Insurance Company, Western Preferred Casualty Company, and The Standard Fire Insurance Company of Alabama are wholly-owned subsidiaries of either F.W.T. Corporation or Western Preferred Corporation.

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STATEMENT OF FACTS

The following statement of facts is taken from the Stipulation of Facts agreed to by the parties herein and filed in the Circuit Court of Tuscaloosa County as the factual record upon which the decisions in this case are based.

1. That the Plaintiff has heretofore issued certain surface mining reclamation bonds on behalf of Hendrix & Lee, Inc., a company formerly engaged in the business of surface mining for coal, pursuant to the Surface Mining and Reclamation Laws of the State of Alabama.

2. That the Defendant is an agency of the State of Alabama whose responsibility as defined in the Alabama Surface Mining Reclamation Act of 1975, is generally to regulate the business of surface mining for coal in the State of Alabama and to enforce the Surface Mining Reclamation Laws of the State of Alabama.

3. That Hendrix & Lee, Inc. is a corporation now in bankruptcy which was formerly engaged in the business of surface mining of coal in the State of Alabama.

4. That the Defendant, by and through its agents, Frank Evans and Bob Cleere, has heretofore on or about the 12th day of January, 1981, caused certain verified complaints to issue against Hendrix & Lee, Inc. alleging certain violations of the Alabama Surface Mining Reclamation Act of 1975.

5. That on or about January 27, 1981, a hearing was held in the offices of the Defendant concerning the verified complaints heretofore filed by Frank Evans and Bob Cleere, as agents of the Alabama Surface Mining Reclamation Commission.

6. That Hendrix & Lee, Inc., though duly served and notified as to the date, time and place of the hearing, failed to appear and the Commission issued an order in each of the five various cases filed by the Commission against Hendrix & Lee, Inc., finding that Hendrix & Lee, Inc., was in violation of certain parts of the Ala-

bama Surface Mining Reclamation Act of 1975, to-wit: failure to reclaim affected lands in accordance with state law, in violation of Section 9-16-39, *Code of Alabama*, 1975, and it was further ordered by the Commission that the surety bonds outstanding on the various tracts of property surface mined by Hendrix & Lee, Inc. and covered under the various cases would be forfeited and rendered due and payable to the State of Alabama.

7. That the Plaintiff was not made a party to the said action but was given notice of the existence of the action and of the time and place of the hearing and was represented by counsel at said hearing.

8. That neither the Plaintiff (Commercial Standard) nor Plaintiff's counsel was allowed to participate in the hearing by the hearing examiner, who was also the Director of the Defendant, Alabama Surface Mining Reclamation Commission, and that even though the Plaintiff specifically requested that it be allowed to present evidence, cross examine witnesses, and subpoena evidence, all such requests were denied. Plaintiff's counsel specifically objected, on the record, that the actions of the hearing examiner denied the Plaintiff the Constitutional right to due process and equal protection of the law and that any orders issued by the Commission would also violate the due process and equal protection rights of the Plaintiff.

9. That Section 9-16-51, *Code of Alabama*, 1975, requires that a verified complaint alleging a violation of the Surface Mining Reclamation Act of 1975, must be filed within ninety (90) days of the event or events giving rise to the said complaint, and further the Code states that this is a jurisdictional matter.

10. That the Defendant (Commission) was aware of Hendrix & Lee, Inc.'s failure to reclaim the land as required prior to the issuance of the citation and order and had been aware of such for a considerable amount of time. In fact, the Defendant had been aware of Hendrix & Lee, Inc.'s illegal failure to timely reclaim the land for as much as fourteen (14) months.

11. That Virgil Willett, Director of the Defendant, Alabama Surface Mining Reclamation Commission, and also the individual who acted as hearing examiner in this case for the Defendant, Alabama Surface Mining Reclamation Commission, alleges to have had some oral communication with representatives of Hendrix & Lee, Inc. concerning their lack of timely reclamation prior to the issuance of the veried complaint by the inspectors.

12. The Defendant (Commission) had no formal policies concerning the manner of inspection by its inspectors. It did, however, have an informal policy that all inspectors were aware of and which they understood they were to follow, which was to inspect each pit on a monthly basis. This policy was not followed in regard to the pits which are subject to the bonds in question.

13. Section 9-16-39(b), Code of Alabama, 1975, specifically requires that "regrading shall begin within six (6) months after the beginning of operations unless such regrading is prevented by act of God, such as unseasonable weather or labor disputes or unless otherwise extended by the Director for reasonable cause; . . . provided further that the applicant shall complete the contouring of all affected land within six (6) months from the date of the completion of operations, unless such regrading is prevented

by act of God, such as unseasonable weather or labor disputes or unless otherwise extended by the Director for reasonable cause."

14. Regrading did not commence on a portion of the properties within the time required by Section 9-16-39 and was not completed on any of the subject property within the time required by Section 9-16-39 of the Code of Alabama.

15. The Defendant (Commission) had actual knowledge for a period of time substantially in excess of ninety (90) days prior to the filing of the verified complaint in this case that Hendrix & Lee, Inc. had failed to reclaim their disturbed surface mining areas in violation of the Alabama Surface Mining Reclamation Act.

16. The Alabama Surface Mining Reclamation Commission files reflect no communications whatever with Hendrix & Lee, Inc. concerning reasonable cause for extending the period of time as set out in the Act within which regrading must be commenced or completed prior to the filing of the verified complaint in these cases.

17. The Alabama Surface Mining Reclamation Commission files do reflect that various "notices of violation" were sent to Hendrix & Lee, Inc. concerning their illegal failure to reclaim and other illegal acts. The files further reflect that no efforts to abate these notices concerning the failure to properly reclaim the land were ever made by Hendrix & Lee, Inc.

18. That while some effort was made to reclaim some portion of the pits in question, the most that was done on any one pit was approximately 60% of the total effort required to properly reclaim the land, and further, that on

much of the surface mining area in question no reclamation whatever was ever done by Hendrix & Lee, Inc.

19. That, if the ninety (90) day jurisdictional time period for filing a verified complaint against Hendrix & Lee, Inc. for its reclamation violations found in Section 9-16-51 applies in this case, then the ninety (90) day period had expired long before the verified complaints were filed.

ARGUMENT

A. No federal question was raised by petitioner or decided against petitioner in the state courts below.

The Alabama Surface Mining Reclamation Commission (hereinafter "Commission") alleges that this Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1257(3), which allows review of a final decision rendered by the highest court of the state where the validity of a statute of the United States is drawn into question or some special right is set up or claimed under a statute of the United States. In fact this case has absolutely nothing to do with federal law, and the Petition filed by the Commission is misleading in regard to the issues in this case.

Commercial Standard Insurance Company (hereinafter "Commercial Standard") emphasizes that the very first time that the federal questions discussed in the petition have ever been mentioned by the Commission is in the petition which was filed with this Court on April 21, 1984. Nowhere in the Petition for Writ of Certiorari

before this Court does the Commission point to any place in the record where any of these federal questions were raised in any of the lower courts. (Note the Sup. Ct. R. 21(1) (h)) The reason for this is that these questions were not raised at any point in the proceedings below and for this reason alone the petition should be denied. *Maxwell v. Newbold* (1856), 59 U.S. 511, 15 L.Ed. 506; *Hoyt v. Shelden* (1862), 66 U.S. 518, 17 L.Ed. 65; *Lynde v. Lynde* (1901) 181 U.S. 183, 45 L.Ed. 810, 21 S.Ct. 555.

Rule 17 of the Rules of the Supreme Court very clearly indicates that a Petition for a Writ of Certiorari to a state court of last resort is to be granted only when there are special and important reasons therefor. The guidelines set out in Rule 17 indicate that a Petition is to be granted when a state court has decided a federal question in conflict with other state courts of last resort or a federal court of appeals, or where a state court has decided an important question of federal law which either has not been settled by this Court or has decided such question in conflict with decisions of this Court.

It is obvious that a Petition for a Writ of Certiorari is designed only to allow for the review by this Court of decisions rendered by state courts of last resort of substantial and important questions of federal law. Certainly it was never intended to provide for review by this Court of a decision by a state court dealing strictly with matters of statutory construction of the Code of that particular state. This case is involved purely and simply with such a question of statutory construction.

No questions of federal law have been decided by the Alabama Courts because no such questions have been

raised. The only federal questions ever raised in this case are the federal constitutional questions raised by Commercial Standard, and these questions are not addressed by the Alabama Courts because the ruling on the state law question fully resolved the case.

The history of this case is that it has been heard and decided by the Commission itself, then by the Circuit Court for Tuscaloosa County, Alabama, the Alabama Court of Civil Appeals, and then a Petition for a Writ of Certiorari was filed with, and denied, by the Alabama Supreme Court. The Commission has filed a Brief in each of these Courts in support of its position, and not one time in any of the Alabama state courts has the Commission argued that any federal questions are involved in this case.

Until now the Commission has argued nothing to the Alabama Courts other than state law, state policy and state statutory construction. No state court has ever issued any ruling, decision or opinion on any federal question in this case, because none are present.

B. This case is concerned solely with the interpretation of statutory law found in the Alabama Code and no valid question of federal law is involved.

None of the "federal questions" argued by the Commission in its petition have been argued at any earlier point in this case because these arguments are spurious and have nothing to do with this case. The only real issues in this case arise out of state law and the lower

court decided these issues correctly and consistently with the past precedents of the Alabama courts.

The Commission argues that the basic problem with the lower court decision is that it too restrictively interprets a state statute which "draws its authority from the federal act". (Petition for Writ of Certiorari page 8.) They argue that § 9-16-51(a) of the *Code of Alabama* was implemented by the Alabama legislature in order to "carry out the purposes of the federal act", i.e., the rights and remedies created by the Federal Surface Mining Control and Reclamation Act of 1977. This simply is not true. The Alabama act was passed in 1975, two years prior to the passage of the federal act. The Alabama Surface Mining Reclamation Act of 1975 pre-dates the federal act, and has in fact now been replaced by the present Alabama law codified at 9-16-70 et seq. of the *Code of Alabama,* which *was* implemented in order to carry out the purposes of the Federal law.

When the Federal Surface Mining Control and Reclamation Act became law in 1977, the Alabama legislature responded by enacting the Alabama Surface Mining Control and Reclamation Act of 1981 which repealed the Surface Mining Act of 1975. The present case was decided under the 1975 Act which was not enacted in response to any federally created rights and was in fact repealed and replaced in response to the federal law. To argue as the Commission does that "the purpose of the Alabama Act is to safeguard these federal rights" (Petition for Writ of Certiorari p. 15) when in fact the federal rights were not even in existence when the Alabama Act was passed, is erroneous and misleading.

The fact is that the Alabama Surface Mining Reclamation Act of 1975 created certain rights and obligations on the part of surface coal mining companies. It further created the Commission and gave it the power, authority and duty to enforce the rights and obligations created by the law. It contained procedures to be followed in enforcing the law and it contained a provision that

> "complaints alleging a violation of the act, rules or regulations of the Commission must as a jurisdictional matter be filed within 90 days of the event or events giving rise to the complaint." § 9-16-51 *Code of Alabama*, 1975.

In the instant case Hendrix & Lee, Inc., a surface mining company, mined property pursuant to permits granted to it by the Commission. The company was obligated to reclaim the property pursuant to the law, and the Commission was charged with the responsibility and duty of enforcing this obligation. The company made very little effort to reclaim the land. The Commission, rather than proceeding to enforce the law as it was charged by the legislature with the responsibility of doing, did nothing until some 14 months after the coal company had abandoned the property. Finally, after the company filed for bankruptcy, the Commission initiated a complaint procedure under § 9-16-51 of the *Code of Alabama*, in an effort to force Commercial Standard to either reclaim the property or forfeit the face value of the bonds. Commercial Standards' only involvement is as surety on performance bonds posted by Hendrix & Lee, Inc. pursuant to the Alabama law.

The essence of this case is whether under Alabama State law the Commission has lost jurisdiction under § 9-16-51 of the Alabama Code to enforce the obli-

gation of the coal company to reclaim the property. The Alabama Courts correctly held that the Alabama law means what it says, and that the failure of the Commission to bring a timely complaint results in a lack of jurisdiction in the Commission to enforce the company's obligation. *Alabama Surface Mining Reclamation Commission v. Jolly*, 373 So.2d 855 (Ala. Civ. App. 1979). The Commission has no authority to hear complaints filed out of time. The effect of this is the release of the obligation of the coal company.

The only other question in the case is whether under Alabama law the release of the principal obligor also releases the surety. The Court correctly answered this question in the affirmative. Again, no federal question is involved and the Commission merely applied the black letter law governing the relationship between a principal and a surety.

The Commission argues that the decision of the Alabama court is so "restrictive" as to somehow offend federal law. The Commission argues that the effect of the decision is that the land will remain unreclaimed and the Commission blames this result on the courts. The blame for the result in this case in fact lies squarely with the Commission itself. Neither the Alabama law nor the decision of the Alabama court is overly restrictive. The Commission had ample opportunity to prevent this result from occurring had it utilized the broad range of powers given it to enforce the state reclamation laws. The Commission abrogated its responsibility and now seeks to place the blame elsewhere by mischaracterizing the true issues in this case and the true basis for the lower court's opinion. Indicative of this is the fact that the Commission never argued that any federal question was present in this case until it became necessary to make that argument in order

to assert jurisdiction in this Court. This Court should take jurisdiction only when a real and not fictitious federal question is present. *Caldwell v. Texas* (1891), 137 U.S. 692, 34 L.Ed. 816, 11 S.Ct. 224.

It cannot be over-emphasized that the statute which is the basis for the decision in this case has been repealed and no longer has anything to do with complaints arising against coal companies mining pursuant to the present Alabama law.

> "In resolving the jurisdictional issue it should be noted that the Alabama Surface Mining Reclamation Act of 1975 has been repealed by Act No. 81-435 Acts of Alabama 1981, § 38. The 1975 Act is applicable in this case, however, because it was in effect at the time the cause of action occurred." *Commercial Standard Insurance Co. v. Alabama Surface Mining Reclamation Commission*, 443 So.2d 1245, 1247 (Ala. Civ. App. 1983). Appendix to the Petition for Writ of Certiorari, p. 7a.

The present law contains no 90-day jurisdictional statute of limitations, as did the 1975 law. No matter how stringent or restrictive the law is as written by the legislature, if it is not zealously enforced by the agency created and empowered to enforce it, then its provisions will be ignored. This is what happened under the 1975 Act in Alabama. The Commission ignored its mandate from the Alabama legislature which was to see that surface mined areas were promptly reclaimed by the mining companies who reaped the profits from the land. The agency did nothing in this case to force Hendrix and Lee, Inc. to properly reclaim the property as it was required to do by Alabama law. Had the Commission done its job, this result would not have occurred, and this case would never have happened. The fact that it did not properly enforce the law

does not, however, amount to a federal question so as to allow this Court to entertain jurisdiction.

CONCLUSION

For the reasons stated above, this Petition should be denied.

Respectfully submitted,

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